

State Notes

TOPICS OF LEGISLATIVE INTEREST

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The Board of State Canvassers: An Introduction **By Suzanne Lowe, Bill Analysis Coordinator**

The Board of State Canvassers is an entity mandated by the State Constitution and established by statute. Although it usually receives little attention, the Board recently was in the spotlight due to its role in certifying petitions for the November general election ballot. In particular, two petitions proposing constitutional amendments were the subject of controversy before the Board, as well as subsequent litigation. One of them, concerning the distribution of tobacco settlement revenue, was certified as Proposal 02-4 on the November 5, 2002, ballot. The other, concerning the sentencing or treatment of drug offenders, was not placed on the ballot.

This article describes the creation of the Board and provides an overview of its responsibilities, with a focus on the Board's role in certifying petitions for Statewide ballot proposals. The article does not attempt to describe in-depth the issues that recently were raised, or to analyze Michigan courts' decisions related to the certification of petitions.

Creation and Operation of the Board

Article 2, Section 7 of the State Constitution requires a Board of State Canvassers to be formed, and governs the membership of this Board as well as local boards of canvassers. The section states: "A board of state canvassers of four members shall be established by law. No candidate for an office to be canvassed nor any inspector of elections shall be eligible to serve as a member of a board of canvassers. A majority of any board of canvassers shall not be composed of members of the same political party."

The Michigan Election Law sets forth procedures for the appointment of the Board of State Canvassers. The four members are appointed by the Governor with the advice and consent of the Senate. The Board must consist of two members from each major political party, selected by the Governor from a list of three names submitted by each party's State central committee (either in January of an odd-numbered year for a position that is up for reappointment, or when a vacancy occurs during a member's term). If a party's State central committee fails to submit names within the time allowed, the Governor must appoint an individual who was formerly elected as a State officer of the party and is presently affiliated with it.

A Board member's term of office is four years, beginning on February 1 following his or her appointment. (An individual who fills a vacancy during an unexpired term serves for the remainder of that term.) A Board member must be a qualified and registered elector of the State, and must take the constitutional oath required of public officers. Board members also are considered State officers for the purpose of constitutional and statutory conflict-of-interest proscriptions.

Three members of the Board constitute a quorum, and an action of the Board is effective only if at least one member of each major political party concurs in the action. In other words, all decisions must be bipartisan, and at least three Board members must be in agreement, for the Board to take action. The Board is subject to the Open Meetings Act.

Members are entitled to \$75 for each day's actual physical attendance at Board meetings, as well as actual and necessary expenses incurred in the performance of their duties. Otherwise, individuals may not receive compensation for functioning as Board members. The Bureau of Elections, in the Secretary of State's office, serves as staff to the Board.



Canvassing and Other Responsibilities

Chapter 31 of the Michigan Election Law sets forth the Board's overall canvassing responsibilities: "The board of state canvassers shall canvass the returns and determine the result of all elections for electors of president and vice-president of the United States, state officers, United States senators, representatives in congress, circuit judges, state senators and representatives elected by a district that is located in more than 1 county, and other officers as required by law. The board of state canvassers shall also determine the result of an election on a proposed amendment to the constitution or on any other ballot question that has been submitted, pursuant to law, to the qualified and registered electors of this state at large for ratification or rejection" (MCL 168.841).

The Election Law also details the procedures of the Board in canvassing returns and performing responsibilities related to the certification of election results, including the recount of votes. In addition, the Board has various duties in regard to determining clarifying designations for candidates' names on a ballot, deciding the sufficiency of petitions for new political party candidates, and approving an electronic voting system.

Ballot Proposal Responsibilities

The function of the Board that tends to be the subject of attention, as well as litigation, involves the certification of petitions for ballot proposals to be voted on Statewide. This role originates from Section 9 of Article 2 and Section 2 of Article 12 of the State Constitution. While neither section refers to the Board itself, both sections mandate responsibilities for "the state officer authorized by law" or "the person authorized by law". The Michigan Election Law states that those terms, as used in the constitutional sections in question, "...mean and have reference to the board of state canvassers and such board shall exercise the duties prescribed in such constitutional provisions" (MCL 168.474).

Article 12, Section 2 establishes the right of the electors to propose amendments to the Constitution by petition. The Board's responsibilities stem from the following provisions:

Such petitions shall be filed with the person authorized by law to receive the same... Any such petition shall be in the form, and shall be signed and circulated in such manner, as prescribed by law. The person authorized by law to receive such petition shall upon its receipt determine, as provided by law, the validity and sufficiency of the signatures on the petition, and make an official announcement thereof at least 60 days prior to the election at which the proposed amendment is to be voted upon.

Such proposed amendment, existing provisions of the constitution that would be altered or abrogated thereby, and the question as it shall appear on the ballot shall be published in full as provided by law.

The ballot to be used in such election shall contain a statement of the purpose of the proposed amendment... Such statement of purpose and caption shall be prepared by the person authorized by law, and shall consist of a true and impartial statement of the purpose of the amendment in such language as shall create no prejudice for or against the proposed amendment.

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Article 2, Section 9 provides for the power of the people to propose laws and to enact and reject laws (called the “initiative”) and the power to approve or reject laws enacted by the Legislature (called the “referendum”). In either case, petitions containing a sufficient number of signatures must be filed. The power of referendum “must be invoked in the manner prescribed by law...”. If a law is proposed by initiative petition, the Legislature must enact or reject it. If the Legislature does not enact the law, “the state officer authorized by law shall submit such proposed law to the people for approval or rejection at the next general election”.

Chapter 22 of the Michigan Election Law details the responsibilities of the Board of State Canvassers in carrying out these constitutional mandates. Among others, the Board’s duties include preparing a statement of purpose of a proposed amendment or question; assigning a number designation to appear on the ballot for each question to be submitted on a Statewide basis; and, upon receiving notice from the Secretary of State that petitions have been filed, canvassing the petitions to determine whether they contain the required number of signatures.

The Election Law authorizes the Board to hold hearings upon any complaints filed or for any purpose it considers necessary to conduct investigations of the petitions. To conduct a hearing, the Board may issue subpoenas and administer oaths. At least two days before the Board meets to make a final determination on challenges to and sufficiency of a petition, the Bureau of Elections must make public its staff report concerning the disposition of challenges filed against the petition. The Board is required to complete its canvass at least two months before the election at which the proposal is to be submitted to the voters.

The Election Law further requires the Board to make “an official declaration of the sufficiency or insufficiency of a petition” (MCL 168.477). This provision is significant to the issue of the Board’s authority, because the Election Law also prescribes the form and wording of a petition to amend the Constitution (or to initiate legislation or invoke a referendum). In addition to containing the full text of an amendment, “[i]f the proposal would alter or abrogate an existing provision of the constitution, the petition shall so state and the provisions to be altered or abrogated shall be inserted, preceded by the words: ‘Provisions of existing constitution altered or abrogated by the proposal if adopted’ [emphasis added]” (MCL 168.482).

These requirements have played a large part in recent and past debates surrounding petitions to place constitutional amendments on the ballot. Specifically, the question involves the extent of the Board’s authority to decide whether a petition meets the Election Law’s requirement to set forth the constitutional provisions that would be altered or abrogated.

This issue was at the heart of hearings before the Board, and subsequent litigation, over the proposals to allocate the distribution of tobacco settlement revenue and to control the sentencing or treatment of drug offenders. In each case, opponents of the proposal claimed that the petition was defective because it did not list all of the existing constitutional provisions that the proposal would alter or abrogate. In regard to the drug offender proposal, at a hearing on September 3, 2002, the Board concluded that the petition was fatally defective. Regarding the tobacco revenue proposal, the Board was unable to come to a consensus on the sufficiency or insufficiency of the petition. Since decisions of the Board require both a majority vote and bipartisan support, the petition was not certified at the Board’s September 3rd meeting.

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After the Board decided that the drug sentencing petition was insufficient, and deadlocked on the tobacco revenue petition, the interested parties immediately filed actions in the Court of Appeals, which issued an order in each case. The Court agreed with the Board that the drug offender petition was insufficient, but ordered the Board to certify the tobacco revenue petition for the ballot. The Michigan Supreme Court then denied leave to appeal in both cases. Therefore, the drug offender proposal was not certified for the November 5th ballot, and the tobacco revenue proposal was certified as Proposal 02-4.

While the Board's role was vigorously debated by the proposals' supporters and opponents, discussed among Board members, and addressed at length in legal briefs, the issue itself is not new to Michigan courts. The integral questions involve the extent to which a petition must identify existing constitutional provisions that a proposal would alter or abrogate; the responsibility of the Board of State Canvassers (or its lack of authority) to determine whether a petition satisfies this requirement; and the related responsibility of the State to publish a proposed amendment and the existing provisions that would be altered or abrogated.

In the tobacco revenue case, the Court of Appeals acknowledged that the Election Law authorizes the Board to make a determination with regard to the sufficiency or insufficiency of a petition, "including a determination of the 'sufficiency' of the petition's compliance with MCL 168.482" (the section prescribing a petition's form and wording). "However, the Board of Canvassers' authority does not extend to conducting a complex legal analysis of constitutional issues." The Court also stated, "The proponents of the petition are not required to list every provision of the constitution that might indirectly or contingently be affected by the proposed amendment."

The drug offender petition, on the other hand, stated that it would add a new Section 24 to Article 1, although that section already exists. The Court held, "There was no legal analysis necessary to conclude that the petition, on its face, purported to replace Const 1963, art 1, § 24, and did not publish the existing art 1, § 24, in violation of MCL 168.482(3)." Regarding the contention that the petition's "numbering error" could be corrected, the Court said, "the proponents...have not shown that they have a clear legal right to certification of a defective petition".

In making these statements, the Court of Appeals cited past decisions of the Michigan Supreme Court that also dealt with ballot petition issues. The recent controversy shows that the previous opinions did not definitively clarify the Board's role in determining the sufficiency of petitions. Although the prevailing principle appears to be that the Board may not engage in "complex legal analysis", whether the Board actually is doing so in any given case is likely to be litigated in the future. The recent Court of Appeals rulings, however, might provide additional clues as to the responsibilities of both the Board of State Canvassers and people seeking to amend the Constitution.